IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1340

DIXIE PLYWOOD COMPANY, *Petitioner,*

v.

S.S. FEDERAL LAKES, PATRAS NAVEGACION, S.A., FEDERAL COMMERCE & NAVIGATION CO., LTD., and SOUTH ATLANTIC TERMINALS, INC., *Respondents.*

BRIEF OF

S.S. FEDERAL LAKES, PATRAS NAVEGACION, S.A.,

and

FEDERAL COMMERCE & NAVIGATION CO., LTD.,

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The trial court's final order is found at 404 F. Supp. 461; the order of the United States Court of Appeals for the Fifth Circuit affirming the trial court is noted at 525 F.2d 691.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit, unassisted by a transcript of the evidence presented in the trial court, erred in affirming the trial court's evaluation of testimony which petitioner contends to have been contradictory, which evaluation resulted in the rejection of Dixie Plywood's theory of damages.

STATEMENT OF THE CASE

In its brief to the Court of Appeals, plaintiff-appellant Dixie Plywood Company, petitioner herein, conceded that the trial court's final order, now reported at 404 F. Supp. 461, is an accurate reflection of the facts of record. Respondents S.S. FEDERAL LAKES, Patras Navigacion, S.A., and Federal Commerce & Navigation Co. (hereinafter, "Federal Lakes" or "the vessel") fully concurred in that concession, and continue to do so.

REASONS FOR DENIAL OF THE WRIT

As this Court has explained in Rule 19, writs of certiorari to a Court of Appeals are granted only "only where there are special and important reasons therefore." In an effort to conform this case to the examples set forth in the rule, Dixie Plywood asserts that the decisions below "create a conflict with all other U.S. Appellate Courts." (Petition for certiorari, p. 4 (emphasis deleted.))

While no other decisions than the Fifth Circuit's ruling in *Holden* v. *S.S. Kendall Fish,* 395 F.2d 910 (5th Cir. 1968), are referred to in an argument of this point,[1] presumably this reference is an attempted com-

[1] In the Statement of the Case, Dixie argues that an example of inconsistency is found by comparison of the trial court's decision with that in *Pioneer Import Corp.* v. *The Lafcomo,* 159 F.2d 654 (2d Cir.), *cert. denied sub nom., Black Diamond Lines* v. *Pioneer Import Corp.,* 331 U.S. 831 (1947). This is Dixie's first citation of that decision in these proceedings.

pliance with the first criterion of Rule 19(1)(b). Dixie further contends that the trial court (and, by its affirmance, presumably the Court of Appeals as well) "erred in its interpretation in [*sic*] the case of *Illinois Central Railroad Company* v. *Crail,* 281 U.S. 57, 64." [Petition for certiorari, p. 5] Apparently this argument addresses itself to Rule 19(b)'s fourth criterion.

Federal Lakes submits that neither argument justifies this Court to grant Dixie's petition. First, Dixie failed to prove that market price in Savannah was an accurate measure of damages. Dixie contends that the trial court erred in rejecting what Dixie now styles as "express testimony as to the fair market value at the port of destination." However, this assertion skirts the issue. *Which* testimony as to fair market value is to be controlling? Dixie's own evidentiary presentation as to value is fully discussed in the trial court's order (404 F. Supp. at 463, 466), where it is observed that plaintiff presented two witnesses whose testimony dealt with value: J. E. Stevens, General Manager of Dixie Plywood of Houston,[2] and Kirby Beame, Vice President and General Manager of Guerry Lumber Company, a Savannah, Ga., building supply dealer. The explicit language of the trial court's order (404 F. Supp. 461) shows a careful weighing of the testimony of Messrs. Stevens and Beame in reaching the conclusion that under the facts of this case—a rapidly rising market coupled with a short supply of plywood and the recent removal of price controls—retail price was rendered an illusory index of fair market value. Reliance on the invoice price thus served to afford to Dixie the benefit of its contractual bargain rather than conferring a windfall.

[2] Stevens' deposition was included in the record on appeal.

Dismayed by the effect of its own evidence, Dixie now seeks to read *Holden* v. *S.S. Kendall Fish,* 395 F.2d 910 (5th Cir. 1968), as a panacea for its earlier failure to present clear and convincing evidence of its monetary losses. Simple comparison of the *Holden* opinion with that of the trial court in these proceedings leads logically to a conclusion that the two opinions are but variations on the same theme. In *Holden,* the Fifth Circuit rejected the shipper's assertion that invoice value, rather than fair market value, should be used as the measure of damages; the reasoning for this holding is equally applicable to the facts at bar: "The carrier is not and should not be the guarantor of the ups and downs of commodity prices." 395 F.2d at 913.

Holden involved unusual facts: the market price at the port of destination was less than the C.I.F. valuation in the bill of lading. *See* 395 F.2d at 912, n.2. The Fifth Circuit further clarified the unique posture of that case by agreeing with J. Heebe [3] that "the amount of damage actually sustained," as set forth in COGSA § 4(5), [4] is to be computed through a formula which does not penalize the carrier for the viccisitudes of the economy: "Courts have consistently held that COGSA seeks the economic realities of the loss rather than the contractual bargain." *Id.* at 912. But where the contractual bargain is a more accurate reflection of "fairness," the *sine qua non* of "fair market value," the contract should bear great weight.

Since the entirety of the testimony of Mr. Beame had not been preserved in the record, the Fifth Circuit could

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[3] *Holden* v. *S.S. Kendall Fish,* 262 F. Supp. 862 (E.D. La. 1966).

[4] "In no event shall the carrier be liable for more than the damages actually sustained." 46 U.S.C. § 1304(5), penultimate paragraph.

only consider the resume of that testimony which is contained in the trial court's order itself. *Drake* v. *General Financial Corp.,* 119 F.2d 588 (5th Cir. 1941). The full extent of that testimony, as recounted in the order, was the retail and wholesale price of plywood "in the Savannah area." 404 F. Supp. at 463. Dixie's own General Manager presented evidence which fully supported the conclusion that retail price was not, under conditions then prevailing, a reliable measure of damages (404 F. Supp. at 466), further admitting that he was not "specifically familiar with" the market value in Savannah at the time of delivery.

Under these circumstances, the trial court, as trier of fact, concluded that neither retail price nor wholesale plus 15% should be the measure of damages, recognizing that "Plaintiff was not forced to purchase plywood at retail in order to comply with its commitments." (404 F. Supp. at 466.)

Hence, Dixie attacked the factual determinations of the trial court by arguing that the testimony of one of Dixie's witnesses should be given preference over another of it witnesses. The appellate courts have frequently and firmly expressed their disinclination to search the record in a non-jury admiralty case where the trial court's findings are set forth in clear and specific detail (*see, inter alia, Skidmore* v. *Grueninger,* 506 F.2d 716, 723-4, (5th Cir. 1975); *and see, McAllister* v. *United States,* 348 U.S. 19 (1954), and *Caradelis* v. *Refineria Panama, S.A.,* 384 F.2d 589 (5th Cir. 1967)), and again demonstrated that disinclination by the affirmance herein.

The focal point of Dixie's appeal was the absence of "proof" in the trial court's order "that market value will not establish a just measure of damages." This

attempted invasion of the province of the court, compounded by the absence of a record adequate to reflect the totality of the evidence presented, failed to present a justiciable issue. In short, Dixie criticized the content of the record but failed to present that record in full. It was not the burden of the trial court to prove damages; that burden rests upon the plaintiff. *Weirton Steel Co.* v. *Isbrandtsen-Moller Co.*, 126 F.2d 593 (2d Cir. 1942); *Interstate Steel Corp.* v. *S.S. "Crystal Gem,"* 317 F. Supp. 112, 121 (S.D.N.Y. 1970). Having failed to satisfy this burden at trial, Dixie asked the Court of Appeals to grant an additur. This argument was without merit.

Alternatively, Dixie argues that the trial court erroneously assigned the burden of proof, contending that the carrier must show that market value is not a proper measure of damages. The case upon which Dixie relies, *Reider* v. *Thompson,* 197 F.2d 158, (5th Cir. 1952), simply states that the trier of fact is entitled to consider a plaintiff's own evidence against him in determining damages; "the measure of damages is a rule of law and the ascertainment of damages is a matter of evidence." 197 F.2d at 161; and *See McCarty Co.* v. *Southern Pacific Co.,* 428 F.2d 690 (9th Cir. 1970). To assert that the defendants did not "prove" the impropriety of blind adherence upon "market value" avoids the reality that the trial court *found* market value to be an inaccurate barometer of loss. No showing of error as to this finding has been made; it is therefore immaterial whether the defendants' proof or Dixie's failure of proof formed the basis for the decision.

CONCLUSION

Petitioner has failed to show any reason justifying review by writ of certiorari. Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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